IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 182 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CHANDAN PANALAL JAISWAL

Versus

STATE OF GUJARAT

Appearance:

1. Special Criminal Application No. 182 of 2004

MR A.D. SHAH, LD. COUNSEL WITH

MR SAURIN A SHAH for Petitioner No. 1-2

MR AD OZA, PUBLIC PROSECUTOR for Respondent No. 1

..... for Respondent No. 2-5

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 15/04/2005

CAV JUDGEMENT

1. Heard ld. Counsel Mr. AD Shah for the petitioners and ld.PP Mr. AD Oza for the State.

2. Invoking jurisdiction of this Court under Article 226 R/w Article 21 of the Constitution of India, the petitioners -original accused of two difference offences registered as (i) I.CR No.2/2004 by Shahibagh Police Station, Ahmedabad and, (ii) I.CR No. 23/2004, by Naranpura Police Station, have prayed to handover the investigation of the said crime to respondent No.5 Central Bureau of Investigation, Gandhinagar, alleging that the investigating agency of both the crimes have failed in carrying out investigation objectively and some unfairness is also shown towards the accused persons during investigation, and collecting the evidence. It is further prayed that respondent No.5 CBI be directed to ascertain genuineness and authenticity about the plea of "alibi" raised by the petitioners accused from the beginning before the Investigating Officer and after carrying out the investigation into the said aspect and to submit is report to the concerned criminal court. Anticipating the favourable result, the petitioners have also prayed that they should be exonerated from both the alleged offences because they were neither present during the commission of the offence nor are involved in any of these two offences, and they have been falsely implicated.

3(i). The present petition was moved by the petitioners on 17.02.2004, prior to filing of chargesheet -report under Sec.173(2) of CrPC, but, I am told that before this Court could pass detailed order after hearing the parties on merits, in view of the strong resistance placed by the State even as to the admission of the petition, the ld. trial Judge after committal of the criminal case, has now framed the charge so far as Sessions Case No.240/2004 is concerned arising out of I.CR No. 23/2004 registered by Naranpura Police Station for the offences punishable under Sec.306 etc. of Indian Penal Code. In response to the facts placed by affidavit-in-reply filed by Mr. PN Barot, ACP, "F" Division of City of Ahmedabad dated 07.04.2005 and the documents attached in support of the affidavit, ld. Counsel Mr. AD Shah appearing for the petitioners has fairly accepted that the prayer as to handing over investigation to respondent No.5 CBI obviously may not be granted because the petitioners, at the time of hearing of the application preferred under Sec.227 of CrPC in connection with the crime i.e. I.CR No.23/2004, have not pressed the plea of "alibi" very seriously . It is contended that the offence in reference to the commission of suicide by the victim girl

Bijal Joshi after certain days or hours of commission of alleged rape on her in Hotel Ashoka Palace and, when the petitioners were in custody, and, therefore, the question of plea of "alibi" would not be a sole governing factor for framing ofthe charge of suicide and, therefore, according to ld. Counsel Mr. AD Shah, the present petition be treated as a petition for one of the two offences and he has concentrated his arguments continuing prayer made in the petition qua the first offence i.e. I.CR No.2/2004 registered by Shahibagh Police Station for the offences punishable under sections 376, 324, 328, 323, 342, 114 of Indian Penal Code and Sec.66(1) and 85(1)(3) of Bombay Prohibition Act. The accused are facing trial of three different cases i.e. Sessions Case No. 239/2004, 240/2004 and 241/2004 and now since the accused have decided to face the charges in Sessions Case No. 240/2004, a submission made on behalf of the petitioners is that merely because they have accepted to face the charge for the offence punishable under Sec.306 etc. of IPC, it should not be even impliedly construed or interpreted that they had withdrawn their plea of "alibi" placed before the Investigating Agency and their request to grant appropriate relief from the Court. This submission is advanced in light of the averments made in affidavit-in-reply (para-7 page-81) of ACP Shri PN Barot.

(ii) The petitioners have been arrested on 04.01.2004 by Shahibagh Police for their involvement in the first offence i.e. I.CR No.2/2004 on the basis of the complaint lodged by Ms. Bijal Joshi- prosecutrix and they were in judicial custody on the day on which she committed suicide on 07.01.2004 as a result of which second offence i.e. I.CR No. 23/2004 came to be registered by Naranpura Police Station for the offence punishable under sec.306 etc. of IPC and both the petitioners came to be arrested in connection with the said offence on account of the complaint given by Ms. Vaishali Joshi- sister of prosecutrix Bijal Joshi.

4.(i) It is contended by the petitioners that from the day one of their arrest, they had intimated to the investigating agency namely respondent No.2 Shri SP Oza, ACP of City of Ahmedabad and other police officers that on intervening night of 31.12.2003 and 01.01.2004 when prosecutrix Bijal was allegedly raped, the petitioners were in the company of their friends elsewhere during the said period at different places. Meaning thereby both were at two or more number of places but not at the place of offence. Friend circle of both the petitioners is different and they have been falsely implicated in the so-called crime of committing gang rape. The allegation

that they were even present at the place where alleged rape was committed, is absolutely false and is far from truth. It is submitted that in their detailed statements recorded by the Investigating Officer Shri Oza, they have placed their say with other relevant details and they are consistent so far as their plea of "alibi" is concerned. The grievance is that the investigating agency, for the reasons best known, had taken no steps to ascertain the genuineness about their say. It is alleged that ignoring the stand taken by the petitioners, the investigation proceeded in contrary direction and investigating agency has attempted to demolish the plea of "alibi" and acted in a negative manner. The Investigating Agency has deliberately ignored the result of scientific tests like DNA Finger Print, Lie Detector Test etc.

(ii) During oral submissions, ld. counsel appearing for the petitioners Mr. Shah and ld. PP Mr. Oza have also referred the details of various mobile phones used on the relevant day and time by the petitioners and other co-accused persons and mainly accused Sajal Jain and two star witnesses i.e. prosecutrix Bijal Joshi and her sister Vaishali Joshi, and it has argued by ld. Counsel Mr. Shah that certain printouts obtained from Cellular Operators were not even supplied to the petitioners and on request, at subsequent stage after filing of chargesheet now they have been supplied with those details and copies of the phone printouts obtained by the

investigating agency. When it is possible in view of the development of the technology and cyber science to ascertain and locate a particular mobile number- sim card, the investigating agency has tried to put curtain on it and has not investigated the plea of alibi by recording statement of number of persons whose mobile numbers have been reflected in the phone printouts taken out as to the the use of mobile of both the petitioners and other co-accused persons and/or prosecutrix Bijal or her sister Vaishali. One of the backbone of the submissions of ld. Counsel Mr. Shah is that just to prove the innocence, they had practically agreed to undergo DNA Finger Print Test and when details of such report are with the investigating agency, then the result recorded by the Forensic Science Experts atleast could have led the investigating agency to carry out further investigation in respect to plea of "alibi" before submitting chargesheet or after submission of chargesheet could have carried out further investigation suo motu after obtaining formal permission from Court in exercise of the powers vested under sec.173(8) of CrPC. According to Mr. A.D. Shah, if details gathered on further

investigation by the investigating agency are not supporting the case of the prosecution or it is found that the result of further investigation is not relevant, or it is insufficient to throw a light on either side, then such documents or statements may not be placed before the Court as a part of chargesheet papers. There may not be any supplementary chargesheet even after further investigation if carried out, but the Investigating Officer should not act in an arbitrary manner resulting into unfairness. The Apex Court and the courts of this country have always insisted for clear and transparent investigation and it is, submitted, therefore that the investigation of the crime registered at Shahibagh Police Station being I.CR No.2/2004 be handed over to respondent No.5 CBI, Gandhinagar or to any other independent agency. It should be practically a denovo investigation, is the basic submission advanced by Mr. Shah for the petitioners.

5(i) There is substance in the arguments advanced by ld. PP Mr. Oza that in any case, fresh or denovo investigation can not be granted and should not be granted in such or similar cases as per settled legal position. Such prayers are normally made only to destroy the case of prosecution and to take disadvantage of a minor contradiction if emerge in the statements recorded by other agency during fresh or denovo investigation and this case does not fall in the category wherein fresh or denovo investigation can be ordered. In support of his submissions, ld. PP Mr. Oza has placed reliance on the following decisions:-

1. M.C.Abraham & Others v/s State of Maharashta, (2003)2 SCC 649;
2. Banti @ Guddu v/s State of M.P., (2004)1 SCC 414;

(ii) The second point of resistance placed by ld. PP Mr. Oza is that the averments made in the petition that the investigating agency has acted unfairly and there is no element of transparency, should be held to be baseless allegation made by the petitioners because the say of the petitioners as to their presence at the place other than the scene of offence i.e. Hotel Ashoka Palace, Shahibagh, Ahmedabad, was investigated and it was not necessary to record statement of each persons that may be necessary to record statement of each persons that may be friends even as per the say of the petitioners. Statement of Chowkidar of farm-house located at a distance of more than about 15 to 20 kms. from the place of incident has been recorded by the Investigating Officer and the contents of the submissions impliedly covers the stand taken by the accused as to their presence at the place other than the place of offence.

Ld. PP Mr. Oza has referred certain part of the statement recorded of Chowkidar of the "farm-house" referred to by the petitioners during investigation and representing their say before the Investigating Officer and other superior officers. Ld. PP Mr. Oza submits that the statements of more than one witnesses of Hotel Ashoka Palace have been recorded and submitted that all the prosecution witnesses and mainly hotel boy has specifically stated that both the petitioners were in one of the rooms where prosecutrix Bijal Joshi was, in the hotel and they were sitting in Sofa in the room when he had been there to serve water to these guests. This evidence, according to the investigating agency was sufficient to rule out the plea of "alibi". Even then if the accused are of the view that they are able to lead better evidence in support of their plea of "alibi", then it is obligatory for them to lead that evidence during trial. Such evidence can be brought on record even during the cross-examination of prosecution witnesses including the Investigating Officer, if need be, and by the witnesses that they may examine as defence witnesses.

(iii) The third point of resistance placed by ld. PP Mr. Oza is that the stand/plea of "alibi" was prima facie tested by this Court while dealing with bail application moved before this Court in connection with very crime and the observations of this Court while rejecting the bail application of the petitioners. The order dated 13.07.2004 (Coram : A.L. Dave, J) should be considered and viewed the same, the present petition should be dismissed observing that the same is moved only to delay the trial and protract the litigation so that the petitioners can take disadvantage of the time spent in conducting the trial. Ld. PP Mr. Oza has pointed out various proceedings initiated by the present petitioners and other co-accused persons and has argued that all these proceedings have been instituted and some of them have seen the test of the order of the Hon'ble Apex Court because the accused including the present petitioners are interested in protraction of trial. According to ld. PP Mr. Oza, this petition also can be dismissed only on account of absence of bonafide.

(iv) The fourth point of resistance canvassed by ld. PP Mr. Oza is that the petitioners had filed discharge application before the trial court in the proceedings of Sessions Case No.240/2004, and they had not pressed for the reasoned order though plea of "alibi" was one of the main point/argument in support of their discharge application filed under sec.227 of CrPC. Now, both have accepted to face trial on merits for the offences

punishable under Sec.306 etc. of IPC qua the second offence i.e. I.CR No. 23/2004 registered by Naranpura Police Station, and, therefore, the petitioners have lost their right/ legal entitlement to continue with the present petition and it should be held that plea of "alibi" at initial stage has not been pressed and, therefore, they can not press now and it should be observed obviously that they can take-up this plea if the petitioners or any of them desires to canvas that plea after recording of evidence that may be led by the prosecution.

The above four main submissions are made by ld. PP Mr. Oza in response to the detailed submissions made by ld. Counsel Mr. Shah on various aspects in accordance with the contents of the petition.

6. Ld. Counsel Mr. Shah has taken this Court through some of the part of the detailed written representation made by the petitioners to Hon'ble The Chief Justice of this Court and President of National Human Rights Commission on 09.04.2004. It is submitted that representation was mainly qua the crime registered by Shahibagh Police Station i.e. I.CR.No.2/2004 and their alleged involvement in the commission of rape on prosecutrix Bijal Joshi. According to ld. PP Mr. Oza, such applications as well as representations should not be given any importance and they should be ignored as irrelevant because they are normally being drafted by the legal experts and with an intention to add complexity and hurdles in smooth investigation in progress. The petitioners, according to ld. PP Mr. Oza, are having strong social background and effective social influence and they belong to a financially well-off family. If they are so desirous to lead evidence in detail in support of their plea of "alibi", they are entitled and at liberty to do it, but by using their social and economic influence, the petitioners can not be indirectly permitted to investigate the defence plea at the costs of the State and prosecuting agency should not be compelled to demolish the evidence that has been collected against the accused by ordering denovo investigation and/or to concentrate investigate on the plea of "alibi" taken by the petitioners.

7. In response to the query raised, ld. counsel appearing for the parties and mainly ld. PP Mr. Oza, have tendered for perusal the details as to the use of mobile phones of accused persons, including the petitioners and the prosecution witnesses obtained during the investigation from different Cellular Service Providing Companies and it would be beneficial to mention some details and contingencies emerging therefrom to

appreciate the say of both the sides.

(i) Investigating Agency, during the course of investigation has concentrated on use of various telephone numbers including land-line telephone numbers of Hotel Ashoka Palace where the alleged offence of gang rape is committed, but the same has mainly focussed on the use of mobile phones of following persons including some accused and prosecution witnesses. These details have been given by ld. PP Mr. Oza while submitting the zerox copies of the printouts obtained from Cellular Service Providing Companies. These details are of :-

(1) Accused Sajal Jain having five telephone numbers; viz.
9868157468 (in the name of SK Industries Pvt. Ltd., New Delhi provided by MTNL);
35740459
36491334
35854168
9811256991
(2) Accused Sugam @ Monti
9879099994
(3) Accused Vinay Jaiswal
31101792
(4) Dharmendra
3100210
(5) Accused Ashok @ Mandan Jaiswal
9824313333 (Idea)
3111331 (Reliance)
(6) Accused Chandan Jaiswal
9824066729
9824074588
(7) P.W.. Vaishali Joshi
9898019689
(8) Prosecutrix Bijal Joshi
8616661
31085810
Underlined number of petitioner Chandan Jaiswal is emerging from the phone printouts supplied, though it is not in the list supplied.

(ii) Of course, in the details supplied by ld. PP Mr. Oza, one telephone number is shown against the name of accused Mandan Jaiswal and accused Chandan Jaiswal, but on close scrutiny of the printouts, it emerges that two different telephone numbers were either used by these two or were in their name and it is rightly pointed out by ld. Counsel Mr. Shah that telephone number provided by Idea Cellular Company i.e. 9824313333 is of Ashok Mandan Jaiswal, but it is wrongly shown in the list as

phone of accused Chandan Jaiswal. Both these petitioners were having two mobile phones probably. In one of the documents, accused Mandan Jaiswal is shown as holder of two different telephones and prosecuting agency has obtained details as to the use of these mobile telephones. For some telephones, details are obtained for the period from 15/16.12.2003 and/or 20.12.2003. But inn the same way, probably relevant, certain details as to use of telephone numbers of residence of accused Sajal Jain and/or father of accused Sajal Jain and of the hospital where accused Sajal Jain, according to the prosecution under alleged sickness, had kept himself avoiding arrest, as alleged by the prosecution, are not available. In the same way, phone printouts as to the use of telephone numbers either landline or mobile of Dr. Gambhir, are also not found at first sight, from the phone printouts papers supplied to the Court for perusal. One Dr. Gambhir was cited as witness by the prosecution, but now he is named as one of the accused.

(iii) Prima facie, it emerges from the record that none of the petitioners were in constant contact telephonically either with Hotel Ashoka Palace or with accused Sajal Jain or prosecutrix Bijal Joshi after 18.00 hours on 31.12.2003 to early morning of 01.01.2004. It is not the say of the prosecution at first place at this stage that any of the telephone numbers shown in the list supplied to the Court by ld. PP Mr. Oza was out of order or was beyond reach i.e. not connectable being out of coverage area and certain long-standing talks or frequency or speed to dial telephone to different numbers or act of constant calling with a particular number or numbers, are emerging as relevant aspects. So, after obtaining printouts, there was scope to interrogate the accused persons and even prosecution witnesses mainly PW Vaishali Joshi and the persons to whom the present petitioners and PW Vaishali Joshi had telephonic conversation during the crucial hours i.e. after 10.30 P.M. on 31.12.2003 & 6.00 A.M. on 01.01.2004. The Court can not ignore the probability that police might have found some strength in the plea of "alibi" pressed into service by one of the accused or both the accused of falsity of it. The accused is not supposed to unfold his defence as per the law of our land, but when accused takes a specific stand from the beginning and opts to place a specific plea of defence, it becomes obligatory on the part of the investigating agency to investigate the stand taken by the accused objectively and thoroughly and to make detailed attempt to falsify the defence and facts gathered if are found relevant, can be placed with report submitted under Sec.173 of CrPC. Slipshod

investigation in this regard may either invite criticism or serious prejudice to the prosecution. Therefore, the moot question raised before the Court by the present petitioners is whether the investigating agency should be directed to go into it in details need to be addressed and if answer is in affirmative, whether such investigation, we may term as "further investigation" or "detailed reinvestigation", should be handed over to any other agency.

8. Undisputedly, it has come on record that one right party was arranged on 31st December 2003 at one farm house which is at a reasonably good distance from the hotel Ashoka Palace where the alleged rape is committed. This is a case of gang rape and the investigating agency, prosecuting agency and the Court are supposed to be sensitive when it comes under obligation to appreciate the facts leading to the commission of the crime and none of the parties directly or indirectly be permitted to put to advantageous position on sheer technicality. Procedural laws are very important and accepted proposition of law is that certain things if are required to be done in a particular manner and style, then that should strictly be done accordingly and not in any other manner or method. This adds strength to transparency and the facts can be placed before the Court for adjudication and to find out truth and, therefore only, in all the cases irrespective of gravity or sensitivity, fairness at each stage has been given tremendous importance by the highest Court of the country. Lacunas can be ignored if they are found not very relevant and if it is possible for the Court to say that it does not adversely affect the case placed by the prosecution or defence and the Courts are not supposed to pay heed to procedural irregularity not resulting into serious prejudice, but such lacuna should not be permitted to percolate at initial stage of investigation or trial which may ultimately result into serious prejudice to either side. This is a case wherein an attempt is made by the petitioners saying that there is important lacuna in the investigation and this lacuna has taken a disastrous shape on account of unfair attitude or because of any other reason, may be negligency or inefficiency on the part of Investigating Officer, and but for this lacuna, they are languishing in jail since very long period of about for more than 15 months and they have been asked to face the trial of a serious offence of gang rape on a festive night of 31.12.2003 and/or early hours of 01.01.2004 i.e. New Year Day. Ld. Counsel Mr. Shah has rightly submitted that when the petitioners are in prison as an under-trial, they are not

at all interested in protraction of trial. On earlier occasion, when resistance before undergoing DNA Finger Print Test was placed before this Court with all anxiety to co-operate with the test, but insistence of the petitioners was that it should be conducted with utmost care and in a scientific manner. There was no ill-intention while placing this resistance and it is the privilege of the accused to pray for bail containing that there is no prima facie case of involvement of any of the accused persons in a serious offence punishable under section 376 etc. of IPC. Both the petitioners are real brothers. One of them was about 19 years and other one was of 21 years of age. According to ld. Counsel Mr. Shah, investigating agency atleast ought to have gone more deep in the investigation when it was found that two real brothers of such a young age have been roped for committing a rape on a same girl-the prosecutrix, and in the same room of their own hotel. Undisputedly, even as per the case of the prosecution, prosecutrix Bijal Joshi was not invited by any of these two petitioners at the hotel on 31.12.2003. As discussed by bail Court, DNA Test is not against any of these two petitioners.

9. DNA Finger Print Test result is already with the prosecution and the Court is not informed with the details of the result or as to direct implication or involvement of any of these two petitioners. The Court is not supposed to comment upon the result of DNA Finger Print Test because the Court is not called upon to do so and it would amount to appreciating the case of the prosecution and that is not the jurisdiction of this Court being disputed question in the present type of petition irrespective of the fact that the petitioners have craved for reliefs under Article 21 R/w Article 226 of the Constitution of India.

10(i) It is true that statement of prosecutrix Bijal Joshi is an important piece of evidence available with the prosecution along with the statements of hotel boy and other personnels of the hotel as to the presence of the present petitioners at the hotel Ashoka Palace during the night hours at about 21.00 or immediately thereafter of 31.12.2003 and the statement of Chowkidar, which reveals that a party organised at the farm-house which is at a reasonable good distance from the hotel, had not lasted for long and version of said witness is that actually the party had practically collapsed and everybody had left the party place. However, none of the guests invited to the party or catering contractor or the person who must have arrangements for celebration, have not been examined by the Investigating Officer. Some

names are specifically referred in the representation made as persons present at the night party. According to ld. PP Mr. Oza, it was not necessary as statement of Chowkidar is sufficient. There may not be any duplication of statements of similar type, but it would be difficult for the Court to infer at this stage that other statements of such or similar persons if would have been recorded, then they would give the same picture that has been given by the Chowkidar. The Court is also not given satisfactory explanation or answer by the Investigating Officer i.e. Officer-in-Charge through ld. PP who has remained present practically throughout on all the days of hearing on earlier occasion and also when the matter was argued lastly, that why printouts as to the use of mobile phone of Ashok @ Mandan Jaiswal received from Idea Cellular Company- a Cellular Mobile Service Provider Company, has not been provided to the accused with the papers of chargesheet though the some of such other phone printouts have been provided.

(ii) It is the case of the prosecution that the sim card number (mobile phone number) i.e. No. 7933111331 is of petitioner No.2 Ashok @ Mandan Jaiswal. The prosecuting agency, atleast, is not entitled to insist to look into for the details which supports prosecution posing them as relevant and say that other details of such printouts of relevant date i.e. 31/12/2003 and 01/01/2004 should not at this stage be read or construed as relevant. Undisputedly, tower code including tower number can be made available and the prosecuting agency was equipped with the details of such tower code and tower number. One can reasonably believe that location including coverage area of each tower were with I.O. prior to submission of the report under Sec.173(2)- the chargeshet, Table provided by Cellular Operators irrespective of the policy of the company, normally bears atleast following details:-

(i) called from;
(ii) called to;
(iii) the date on which telephone call is made
(iv) talking time (duration);
(v) time when telephone call was made and got connected including hours, minutes and seconds;
(vi) tower number or area code of tower.

(iii) It is possible to obtain details of tower code or tower number and investigating agency handling the investigation of such a serious offence can easily obtain such details. The say of ld. Counsel Mr. Shah has

ample force that when it was found from the printouts of accused Ashok @ Mandan Jaiswal as to the use of his Reliance mobile in detail and Idea mobile details that when a particular number was called from a particular mobile handset containing concerned sim card was within the range of a particular tower or it was under a particular tower code, then it was possible for the investigating agency to go to the holder of the telephone through which a telephone call was made; e.g. Mobile Phone number of accused Mandan Jaiswal provided by Reliance was used on 31.12.2003 on four occasions and the caller had contacted four different numbers. On first occasion, duration of the talk was of 3.2 seconds. Second talk was of 37.2 seconds, third one was of 499.5 seconds and last one i.e. 4th talk lasted for 60.2 seconds which was made in the earlier hours of 01.01.2004. While calling four different numbers, the actual holder of mobile phone of accused Mandan Jaiswal, may be the petitioner accused Mandan Jaiswal or may not be, was under coverage area of Tower Code No. LWAHDB-1, LWAHDB-2. Tower Numbers are materially different i.e. 27,42, 44 and 11. Tower No.27 is located at Nandini Appartment , Nr. Padmavati Appartment, Naroda Road, Naroda. Tower No. 42 is on a open plot owned by one Shri Tushar Patel bearing Sr.No.66 situated at Koba Circle, Koba. Tower No. 44 is located at DA-IICT, Near Infocity, Gandhinagar and fourth telephone call was made when holder was under the coverage area of Tower No.11 located at AMC Open Plot, Opp: Saurabh Garden. Immediately thereafter, this cellular phone holder was under Tower No.49 and from where he had called two other different persons and Tower No.49 as per printout is located somewhere on Ahmedabad Sanand Road area, i.e. a way to village Bopal going towards Vasant Vihar Bungalows. At about 3.00 A.M., The holder had called one telephone No.9898077881 and talk lasted for about 35 seconds and at that time caller was under coverage area of Tower No.6 and this Tower No.6 is located Near Prem Darwaja (Water Distribution Station, Near Dariapur Police Station), Ahmedabad. Atleast, the investigating agency could have recorded the statements of these four to five persons, or of atleast two-three persons and ascertained that who talked and with whom, at the relevant time and could have confirmed that it was not accused Mandan Jaiswal. Such confirmation might have provided scope to investigating agency to interrogate accused Mandan further or these details could have been placed before the Court to falsify the stand taken by the accused. However, the act of non-investigation in this direction, according to ld. Counsel Mr. Shah, is nothing but unfairness and it reflects biased mind. The

prosecution may not produce such evidence, if collected if prosecution does not want to rely upon such particular part of evidence, but when it is clear that investigation in this direction is not carried out at all, then atlest, it should be held that investigating agency has adopted one-way approach and reached to conclusion, in a slipshod manner.

(iv) It is on record that prosecutrix Bijal had never made telephone calls to accused Mandan Jaiswal. This emerges from the telephone printouts of cellular phone of prosecutrix Bijal Joshi. The same is the situation as to the use of mobile phone of P.W.. Vaishali Joshi, sister of the prosecutrix. Some details given in the above paras and comments made thereon, automatically emerges as relevant aspect to appreciate the points raised by ld. PP Mr. Oza before the Court because at no point of time, ld. PP Mr. Oza has submitted that DNA Finger Printing Test clearly implicates any of these two petitioners with the crime. It is true that ultimately, everything would rest on total evidence that may be led by the prosecution and only on the reports of scientific test carried out by the exports.

11. Fairness at all stages in or criminal justice adjudication system is expected because there is presumption of innocence in our criminal jurisprudence. In large number of cases, method, style and bonafide of investigating agency or some of the officers entrusted with the investigation or part of thereof, are now a days viewed with suspicion and, therefore, fairness and transparency is being insisted upon at each and every stage and, therefore, the prosecuting agency in our country is different then the investigating agency. Public Prosecutors are not the Police Prosecutors and, therefore, before placing facts before the Court during trial, it would be in the interest of prosecuting agency to have all details so that it can effectively meet with unscrupulous defences and the accused can be prevented from taking disadvantage of the lacuna left on account of any reasons, may be because of inefficiency or negligence or dishonesty and it should not result into serious prejudice even to the prosecution. Sometimes, such investigation may help the prosecution in adding strength to its say. So, when such an attempt is made the State, unless such an attempt is totally hopeless or baseless, should accept the request and such a plea should not be resisted on a sheer technical ground.

12(i) Sec.2(h) of CrPC defines "investigation" and it includes all the proceedings under the Code of Criminal

Procedure for collection of evidence conducted by the police officer or the person who is authorised by the Magistrate in his behalf. It means, collection of evidence as to crime reported is the main activity with a goal to unearth the truth. Therefore, the investigation is nothing but a search for material and facts in order to find out whether or not the offence has been committed. It does not matter whether it results into the affirmative finding or the negative. Sometimes, the investigating agency may reach to a conclusion that a particular offence is committed, but the agency gets failure in linking a particular person with the crime as an accused because every criminal trial is looked as quest of truth for better justice to punish the guilty and restore the peace, stability and order in the Society. As said by the Apex Court in the case of State v/s Aniruddhasinh, AIR 1997 SC 2780, chargesheet needs to contain facts constituting offence charged. So fairness, impartiality, honesty on the part of the investigating agency can always be questioned at any stage of investigation or criminal trial. It is the privilege of the accused to impeach the creditworthiness of evidence collected, method of collecting it and such evidence, if adduced, then its legality, relevance and strength. The Code of Criminal Procedure is sufficient to take care so that investigation remains on track and transparent and, therefore only, the investigating agency itself is authorised to restart further investigation of the very crime even after filing of the chargesheet suo motu and without any formal order from the competent court. It may indicate simply to the Court that it has started activity of further investigation in the crime in question under sec.173(8) of CrPC. However, as per settled legal position, fresh investigation is not permissible under the scheme of CrPC. Of course, in the case of TT Antony v/s State of Kerala, AIR 2001 SC 2637, the facts are materially different, but the ratio laid down in the said decision is found relevant even in present case. In the case of Randhir Singh Rana v/s State (Delhi Administration), AIR 1997 SC 630, the Apex Court has observed that the police on completion of investigation submits chargesheet and Magistrate takes cognizance of the offence mentioned in the chargesheet issues summons, even then the police has powers to make further investigation even after taking of cognizance on new facts coming to light subsequent to submission of the chargesheet. I would like to quote relevant paras from the above-cited decision;

" The aforesaid being the legal position as discernible from the various decisions of this

court and some of the High Courts, we would agree, as presently advised, with Shri Vasdev that with the grey area to which we have referred the Magistrate of his own can not order for further investigation. As in the present case the learned Magistrate had done. So, we se aside his order and direct him to dispose of the case either by framing the charge or discharge the accused on the basis of material already on record. This will be subject to caveat that even if the order be of discharge, further investigation by the police on its own would be permissible, which could even and in submission of either fresh chargesheet."

(ii) In the same way, in the case of Shri B.S.S.V.V. Vishwandadha Maharaj v/s State of A.P., AIR 1999 SC 2332, it is observed by the Apex Court after referring the decision in the case of Ramlal Narang v/s State, AIR 1979 SC 1791, that :-

" In such a situation the power of Court to direct the Police to conduct further investigation can not have any inhibition. There is nothing in Sec.173(8) to suggest that the Court is obliged to hear the accused before any such direction is made. Casting of any such application on the Court would only result in encumbering the Court with the burden of searching for all the potential accused to be afforded with the opportunity of being heard. As law does not require it, we would not burden the Magistrate with such an obligation."

(iii) So, there is some force in the submissions of ld. PP Mr. AD Oza that though this application was moved much earlier and the investigation was pending and no formal chargesheet was filed, there is no scope to order fresh investigation or reinvestigation. When the Apex Court was scrutinising the notification wherein the words "reinvestigation" used by the State of Kerala in reference to a crime ordered to be investigated by CBI, it is observed that "from plain reading of the above section, it is evident that even after submission of police report under sub-section (2) on completion of investigation, Police has a right of further investigation, but no fresh investigation or reinvestigation." However, it would be difficult for this Court to interpret that as in the present case no formal chargesheet was filed, this Court can order fresh or re-investigation by any other independent agency

including Central Bureau of Investigation (CBI for short). When the present petition was moved, the investigation had picked up a great momentum and material sensitive part of the investigation had taken appropriate shape. Investigation may not progress or take shape to the satisfaction of the accused or it may take a shape different than expected by the accused persons and certain lacunas if are found left out, that by itself would not make the bonafides of investigating agency doubtful. It need many more than routine mistakes or minor errors giving rise to some lacuna or procedural error. It is easy to impeach malafide on investigating agency or sometimes, it is possible to question the style of investigation enlarging the minor lacuna left. This happens in "n-number" of cases as the same rests on so many contingencies including the knowledge, efficiency, experience or even integrity of the officer. So, the request to hand over investigation to an independent agency and/or to give directions such agency to reinvestigate the crime or to start de novo investigation even so far as the present two petitioners are concerned, is not legally possible. The Court also apprehends that this may result into a serious prejudice to other accused and also to the prosecution. Certain observations by the Apex Court in the decision known as Best Bakery Case viz. Zahira Shaikh reported AIR 2004 SC 3114 are the observations made in a given case and in given circumstances. Of course, none of the counsel has placed reliance on the observations made by the Apex Court in Best Bakery Case, but it is necessary to observe that even under serious allegations, the Court should go very slow even while directing further investigation. Re-investigation or fresh investigation should be ruled out except in extraordinary or the rarest of rate case.

(iv) Ld. PP Mr. Oza has placed reliance on one decision of the Apex Court in the case of State of Orissa v/s Debendra Nath Padhi, 2005 SCC (Cri.) 415. In the present case, ratio of the cited decision is not found applicable because the Apex Court has held that at the stage of framing of charge, accused has no right to file any material or document at that stage for want of specific provisions in the CrPC. The accused here are not praying for production of any document from their custody or possession nor they have attempted to summon any witness for producing the documents under sec.91 of CrPC. The petitioners even do not dispute that the trial Court can not, at the time of framing of charge, consider material other than the material produced by the investigating agency, but the say of the petitioners is that while submitting police report, important defence

plea has not been investigated and there are material lacunas deliberately left out by the Investigating Officer under biased mind and this is nothing but a result of lack of bonafide. Indirect submission of ld. Counsel Mr. Shah before the Court is that as the Investigating Officer Mr. Oza -respondent No.2 was kin to prosecute both the petitioners, he has not conducted investigation in search of truth and in the direction that was suggested by the accused persons pleading innocence stating that they were present somewhere else and not at the place where alleged rape or gang rape was committed i.e. at Hotel Ashoka Palace. Irrespective of suppression of other facts could have taken him to ascertain the correctness of the aspect of the petitioners' false implication, or their presence "elsewhere".

13(i) Dictionary meaning of "further" is equal to "additional" and/or "supplemental". The petitioners have prayed that previously, one-sided investigation was carried out by respondent No.2 Mr. Oza which requires tobe ignored and fresh investigation by any independent agency namely respondent No.5 CBI may be ordered. Of course, this Court can issue such directions, but ordinarily, in exercise of powers under section 173(8) of CrPC, either party can not pray for any particular officer or agency for conducting investigation as envisaged under this section. Even it can not suggest the rank of the officer who should conduct such investigation. So, it will be difficult for the Court as a matter of prudence to accept the prayer mechanically and transfer entire investigation to CBI as prayed especially when the report under sub-section (2) of section 173 of CrPC is already filed, as discussed in foregoing para-12. to CBI as prayed. This should not be done and is not required to be done merely because ld. Counsel Mr. Shah has successfully pointed out important lacuna and non-optimity in not to investigate the plea of "alibi" placed by the accused. The anxiety of the petitioners, if taken into account, is that it was possible for the Investigating Officer to deal with the plea of alibi sincerely and efficiently. So, this anxiety in the background of facts discussed earlier, are able to open a window for further investigation and such further investigation is nothing but continuation of earlier investigation and not a fresh investigation or re-investigation to be started ab-initio wiping out earlier investigation altogether. Sub-sec.(8) of Sec.173 of CrPC envisages that on conclusion of further investigation, investigating agency is supposed to

forward its report to the Magistrate or to the concerned Court and that would be a further report or reports which can not be termed as fresh report or reports regarding the further evidence if so collected during such investigation. This is the ratio laid down by the Apex Court in the case of K.Chandrasekhar v/s State of Kerala, 1998 SCC (Cri.) 1291 = 1998(5) SCC 223). On one hand, the prosecution says that accused should not be permitted to produce any document or his contentions in the midst of the trial or before culmination of the evidence that prosecution may lead, and on the other hand indirectly keeps vital part of investigation incomplete in line of the case of the accused placed before the Investigating Officer when interrogated. e.g. if a plea of self defence or insanity if has been pressed into service from inception, whether Investigating Officer can be said to be under obligation to collect evidence by detailed investigation either to confirm it or to falsify it, is the question, similar to the points raised by the petitioners.

(ii) It appears clearly from the papers of investigation and statements of prosecutrix Bijal Joshi, PW Vaishali -sister of the prosecutrix, hotel boy Bherusingh Kishorsingh Rao (Rajput), Receptionist Pramod and witnesses from the staff of hotel Ashoka Palace and Chowkidar of the farm house, no detailed investigation in respect to various telephone calls has been carried out especially after obtaining details from various telephone companies including telephone printouts ..... and DNA Finger Printing Test Report. There was scope for Investigating Officer to record further statement of number of witnesses including the persons who have noted presence of the petitioners at Hotel Ashoka Palace in the night of 31.12.2003 and early hours of 01.01.2004. Now the prosecutrix Bijal is no more, but number of telephone calls made by her during the crucial hours and received by her, also look significant. At more than one place, the prosecuting agency had shown telephone number of accused Ashok @ Mandan Jaiswal incorrectly as telephone of his brother accused Chandan Jaiswal, because it is consistently submitted by both the brothers that they were not together during these crucial hours. Prosecutrix Bijal Joshi had received telephone calls between 22.00 to 22.30 hours on 31.12.2003 and 0.38 hours on 01.01.2004 and total 10 telephone calls were received from 4 different numbers i.e. 7931067130, 9825311461, 7931093879 and 7931097760 and from the very telephone numbers, the prosecutrix Bijal had talked making certain telephone calls (outgoing calls) and to the person mainly available were on two different telephone number i.e. 9879099994 and 9825211461 and one such telephone

conversation had lasted for 171.9 seconds and other one for 188.3 seconds. These telephone numbers atleast are not reflected in the list of telephone numbers given to the Court for perusal by ld. PP Mr. Oza. However, it was possible for the investigating agency to go into it by recording statements or further statements of the persons-holders of those telephone numbers. Absence of telephone conversation between prosecutrix Bijal and accused persons during these crucial hours may not be relevant, but ultimately it may get relevance if the plea of alibi, after investigation, is ruled out. So, atleast this Court shall have to say that this is a case where some further investigation is required to be ordered.

14. It was the privilege of the investigating agency and when they have refused to exercise this privilege ignoring the facts pointed out by the petitioners, then this Court with a view to do the substantial justice, can direct the investigating agency to go into it and if so desired, other part of investigation that may be found incomplete where by certain lacuna have started peeping out, can be filled in during this further investigation. As observed earlier, this may go against the petitioners and their wish or desire.

15(i) The Court is not in agreement with the submission of ld. PP Mr. Oza on the point that this plea of alibi was raised specifically before this Court and the same has been negatived and, therefore, such relief to investigate the plea of alibi can not be granted and it would amount to reopening the issue prima facie decided. In support of this submission, ld. PP Mr. Oza, Mr. Oza has referred para-11.2 of the decision of this Court in Cri.Misc. Application No. 4981/2004 with Cri. Misc. Application No. 5003/2004 decided on 13.07.2004. It would be beneficial to reproduce the relevant para of the said order whereby this court has turned down the request to grant bail, as under:-

> "11.2 It was heavily canvassed that the applicants plea of alibi has not been examined. Against this, there are statements of witnesses Saji and Pramod to show presence of both the applicants in the vicinity of the time and place of incident. Therefore, the defence version of alibi stands countered by statements of these two witnesses and would call for adjudication as to whether to accept the plea of alibi or to accept the prosecution version indicating presence of the applicants in the vicinity of the time and place of incident, coupled with a specific

allegation of rape made by the deceased in the complaint and her suicide note. At this stage, it is not possible for to discard the prosecution case showing applicants' involvement in this incident emerging from FIR, suicide note etc. besides the statements of said two witnesses and to accept the plea of alibi. Nor it is possible to infer a biased investigation on such a plea as suggested on behalf of the applicants."

For this, the say of this bench in subsequent para of the decision is important. Yardstick of bail court is materially different then the Court who is asked to decide the application under section 227 of CrPC praying discharge. This Court, while dealing with the petition being Cri. Revision Application No.54/2004 decided on 06.04.2005 (Coram : C.K. Buch, J), has in para-6 observed thus;-

"6. ..... The finding recorded by the bail court, according to Mr. Dave, would not help the petitioner at this stage and the Court at the relevant time was supposed to consider the aspect in the cases based on circumstantial evidence whether the accused in a given set of facts should be kept in custody pending trial or he should be enlarged on bail. So, in view of the social status and the scope of securing presence of person-accused, this Court thought it fit to enlarge the petitioner-accused on bail. The bail Court is not supposed to evaluate intrinsic part or nitty-gritty of the story of the prosecution and evidence collected by the Investigating Agency and, therefore, the bail Court had not entered into that area."

It has been further observed in 10(ii) of the said decision as under :-

"10.(ii) At present, the petitioner is on bail. The reasons assigned by this Court while enlarging the petitioner on bail in such a serious offence would not make the case of prosecution unsustainable or it can not be equated with the absence of material sufficient to continue the prosecution, only if the material is not sufficient to disclose an offence, the charge framed or the trial normally should not be terminated. The yardstick of Bail Court and the trial Court is materially different. "

So, the observations made by the Court while

dealing with bail application would not come in the way of this Court in appreciating the plea raised and the prayer made in a substantive petition filed under Article 226 R/w Article 21 of the Constitution of India and language of para 11.2 reproduced above simply says that it is not possible to infer the bias investigation on such a plea as suggested on behalf of the applicants (present petitioners) and the Court has accepted the version of two witnesses namly Saji & Pramod (Receptionists of the Hotel) indicating presence of the applicants at Hotel Ashoka Palace (present petitioners), which according to the petitioners are incorrect observations as initial statement of said witnesses in terms do not show the presence of the petitioners at Hotel during the alleged rape. It is observed by the Apex Court in one decision that the presence at a distance of couple of yards (500 to 700 yards) may be ignored even when plea of alibi is taken and established. However, in view of the observations made in foregoing paragraphs, there is no investigation as to the location of telephone numbers of accused Mandan Jaiswal under different towers of two different mobile phones provided by Cellular Service Provider Company. Telephone numbers shown in the name of the petitioner against accused Chandan Jaiswal was hardly used during these crucial hours and it emerges from the printout shown to the Court. There is no evidence to show at this stage before the Court whether one of the petitioners namely accused Chandan Jaiswal was carrying second mobile telephone of his brother i.e. accused Mandan Jaiswal. Location of number of towers are codified by the companies in their own way. So, whether accused Mandan Jaiswal was simultaneously carrying both the mobile phones or not is also one important question. It is true, as argued by ld. PP Mr. Oza, that all nitty-gritty of the defence plea can be proved by the accused to demolish the case of the prosecution and to disprove the allegation made against them by the prosecution, but at this stage, the prosecution can not be compelled to examine the defence plea and to collect evidence for defence side. However, the say of ld. PP Mr. Oza is not found either simple or legally acceptable, in view of the accepted principles of our criminal jurisprudence because as observed earlier, fairness at each stage is expected. Unless the investigation is fair and transparent, whether the accused can be said to have been offered a fair trial is another question and that would remain unanswered if the arguments of ld. PP Mr. Oza is accepted to be legal and correct.

(ii) The Investigating Agency is not supposed to produce the documents for evidence collected during the

evidence that has not been relied upon for chargesheeting the accused. But the prosecuting agency is materially different then the investigating agency. So, the prosecuting agency may not be compelled to produce the documents or evidence not to be relied upon from its side, but some facts -documents are available only with either investigating agency or prosecuting agency, then at the request of the accused, such documents or evidence if relevant, can be made available to the accused and it can not either refuse or neglect investigation on the discretion apprehending that it may turn either against the complainant side or in favour of some of the persons accused if not all. There should not be any discrimination in exercising discretion because the goal is of search for truth.

(iii) The decision cited by ld. PP Mr. Oza in the case of Banti @ Guddu (supra), would not help the ld. PP Mr. Oza. In the cited decision, the prosecution has cited several witnesses; some related and some not related to the victim; and the ld. PP, as held by the Apex Court, was not under compulsion to produce witnesses, who according to his opinion, would not support the prosecution case. It is further evident that defence can cite such witnesses as witnesses and examine them as defence witnesses. The decision of the ld. PP not to examine a particular witness, was ultimately held to be fair. However, the facts of the cited decision are materially different than the facts of the present case.

(iv) In the same way, in the case of MC Abraham (supra), the Apex Court was dealing with different point. One of the issue before the Apex Court was that the Investigating Officer, having regard to facts and circumstances, considered arrest of certain persons in a case unnecessary, High Court in exercise of jurisdiction vested under Article 226 of the Constitution, directed the State or Investigating Officer to arrest those persons, even though the case was at the stage of investigation, and in this background the Apex Court held that "that would amount to unjustified interference with the investigation." In the present case, the investigation has been concluded and though the present petition was pending and on earlier occasion written representations were also made so that if this Court satisfies to issue directions in view of the Scheme of sec.173(8) CrPC. In the background of the facts discussed herein above, it would not be proper to say that it would amount to interference with the investigation and, therefore, this decision also would not help the respondent State.

(v) In one of the recent decisions in the case of

State of M.P. v/s Munna Choubey & Another, 2005(2) SCC P.710, The Apex Court has observed thus;

> "Rape is violation with violence of a private person of that woman and outraged by all means. By the very nature of the offence, it is obnoxious act of the highest order. The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not a mere physical injury, but deep sense of some deathless shame".

Therefore, investigation in such cases should be without any lacuna or infirmity which ultimately may help the accused or some of them. It is equally deathless shame for a person/male who is found involved in a gang rape and that too on a festive night. So period of punishment on such or similar case even imposed, would not bring the accused out of social scar. It is also relevant to note that both the petitioners are real brothers and were young persons of 19 & 21 years of age at the relevant time.

(vi) On the contrary, the observations of this Court in the case of State of Gujarat v/s Deepak Jaswantlal Sheth, 1998(3) GLR P.2240 are more relevant and the ratio discussed and re-propounded in the said decision would squarely apply to the facts of the present case. The Court in the cited decision, was dealing with the application for bail in the background of the scheme of section 437 & 439 of CrPC and in paras 4 & 5 of the cited decision, this Court through Hon'ble Mr. Justice R.Balia, as he then was, has observed thus:

> "4. The learned APP has in the first instance urged with considerable vehemence that the learned Sessions Judge has taken into account the plea of alibi set up by the accused in defence at this initial stage for considering the bail application, which is not permissible in law and the Sessions Court ought to have confined his consideration to the material which has come on record during investigation by the investigating agency. The plea of alibi can be set up and proved in the course of trial. It was further urged that the burden of proving such plea rest on the accused, and even if the accused were to unveil its defence during the course of investigation by setting a plea of alibi, the investigating agency is not under obligation to examine that plea at that stage.

5. Having carefully considered the contention, I am unable to sustain the same. Neither investigation can shut its eyes and refuse to examine the case set up by the accused which leads to exonerate complicity of accused in the commission of crime, nor the Court would be justified in not taking into consideration all the possible defence or circumstances emerging from the material on record before it, which are germane for consideration of application for releasing the accused on bail, whether during investigation or pending trial. Rather, it would be the duty of the investigating agency to enquire into all facts brought to its notice as it is duty-bound to remove the mist of obscurity surrounding the true facts. It is true that the accused is not bound to reveal his defence during investigation, but if he does so and pleads his innocence before the investigation officer, the investigating agency can not ignore the same and confine itself to inquire in such direction for proving that the accused is guilty of the offence alleged against him. That would be a non-fair investigation. Investigation is not to prove X or Y as the guilty of committing offence, it is to find who has committed the offence. If the accused at the very outset stated that it is impossible for him to have participated in the commission of crime because he could not have been present at that place for definite reasons disclosed by him, it can not be said that the investigating agency is not under obligation to inquire into the possibility of that defence to be truthful which exonerates accused from the allegation and investigating agency is required to change its direction to find the true culprit. The obligation or the duty of the investigation is not to make out a case against the persons who have been accused of having committed offence by complaint or by another witness, the obligation is to find the truth from each and every source as it comes to it. That is also the duty of investigating agency as per the guidelines contained in the Manual of Procedure guiding investigation."

It is said in the very judgment that the question of complicity of the accused in the offence is a distinct question from the question whether on account of some irregularity in the conduction of investigation whether

the accused is entitled to get benefit.

16(i) The decision in the case of Shirish Madhavdas Parikh v/s State of Gujarat, 1990(1) GLR 617, does not lay down any such principle that in no case the defence version which supports the plea of non-complicity of the accused can be taken into consideration by the Court considering the application for bail. In the present case, the police also ought not to have felt satisfied merely because prosecutrix Bijal, or PW Vaishali and Chowkidar has said something in support of the say of the theory placed by the prosecution. Without commenting on the theory placed by the police in the legal background of sec.32 of Evidence Act At this stage, I would like only to refer Clause:137 of Gujarat Police Manual,1975 Vol.III whereby it is unequivocally said that:-

" Police enquiries should always be impartial. It is the duty of the police to do all they can to find out the truth. An investigating officer is to aim at discovering the actual facts and arresting the real offender. He ought not prematurely to commit himself to any view of the facts for or against any person. He should consider carefully any evidence tendered to him on behalf of an accused person. He should not make up his mind on any point hastily, but keep, as far as possible, an open mind to be influenced by evidence only."

In the same way, sub-clause (2) of Clause 172 of the Police Manual is also found relevant, whereby it is provided that;

" It is equally important and advisable for an investigating officer to record the statement of an accused person, especially if it consists of lengthy details in complicated cases, so that these details may not be forgotten or overlooked in the course of enquiries for their verification. The statement may sometime disclose his line of defence and may also at times indicate sources from which independent evidence may be available."

For short, it was not permissible to the Investigating Officer Mr. Oza, ACP to ignore the line of defence revealed by the accused during the course of investigation at very early stage and to keep it out of consideration substantially.

(ii) In some exceptional cases, the Apex Court has

observed that whether the stand taken by the accused is consistent or not, the statement made by the accused at first instance also can be read/considered to corss-check the version given by him in his further statement made under section 313 of CrPC (Sec.342 of Old CrPC). Especially in ACB cases where accused have revealed some thing in presence of panchas and police officers of raiding party.

17(i) It is true that the present petitioners may be economically or financially sound and if asked or compelled, they may lead detail evidence by calling experts of any Cyber Science and also theory and effect of overlapping of range between two or more towers and that too of two or more different companies providing such service. But, this Court is supposed to look to the poorest under-trial prisoner who has otherwise limitation to interact with the lawyers or the pleaders provided by the State or appearing as amicus curie. Under a bonafide mistake certain important part of investigation is not touched or some new facts either coming to the notice of investigating agency or they are placed to the notice of investigating agency, as like in the present case, Investigating Officer can positively start further investigation intimating the Court about further investigation undertaken by him. On the contrary, it becomes obligatory on the part of I.O. It is not necessary to reproduce or quote relevant paras 15, 18, 20, 21 & 22 of the decision of the Apex Court in the case of Ram Lal Narang v/s State (Delhi Administration), AIR 1979 SC 1791. However, the ratio laid down by the Apex Court in the said decision is that;

" notwithstanding that a Magistrate had taken cognizance of the offence upon a police report submitted under Section 173 of the 1898 Code, the right of the police to further investigation is not exhausted and the police can exercise such right as often as necessary when fresh information comes to light. There was no provision in the Code of Criminal Procedure (1898) which, expressly or by necessary implication barred the right of the police to further investigate after cognizance of the case had been taken by the Magistrate. Neither S.173 nor S.190 lead to day that the power of the police to further investigate was exhausted by Magistrate taking cognizance of the offence. Practice, convenience and preponderance of authority, permits repeated investigations on discovery of fresh facts."

(ii) Non-conversation between both the brothers on their respective mobiles for a reasonably good days or certain limited talks that had taken place is also an area under which accused could have been interrogated and in turn other prosecution witnesses could have been interrogated. There was ample scope and still there is ample scope to record further statements on the strength of new facts and certain untouched aspects, of the witnesses who have been cited as witnesses in the chargesheet including PW Vaishali, Chowkidar of farm-house, hotel boy etc. and the witnesses named by the petitioners if they are found otherwise competent witnesses.

18. The plea of alibi if is being taken by the accused, then is considered to be a dangerous plea of defence. Even then, in the present case, the petitioners have unfolded their line of defence and, therefore, in such a case struggle to bring truth out could have been started much earlier from the police personnel of the lowest rank or the person so authorised to investigate by the Magistrate. It would be wrong to presume that all the persons named by the petitioners during their interrogation, would support the petitioners only because on one hand, the prosecution says that some of the hotel staff members have not supported the say of the petitioners. So, on the ground or pretext that these witnesses shall not support the prosecution, the investigating agency can not ignore to examine them during investigation. If their say is not supporting the prosecution, their statements may not be made a part of chargesheet. As per legal requirement, investigation must be fair and to deal with the accused "fairly". The word "fairly" should not be construed synonymous to the word "truly". The grievance made before this Court is that fairness is not shown as the investigating agency intends to see that truth is not peeping out. In para-21 of the above-cited decision in the case of Ramlal Narang (supra), it is observed that "when it comes to the notice of the investigating agency that a person already accused of an offence has a good alibi, is it not the duty of that agency to investigate the genuineness of the plea of alibi and submit a report to the Magistrate? After all the investigating agency has greater resources at its command than a private individual." The Court should also think of a person accused having minimum means.

19. Non-pressing of the plea of "alibi" by the petitioners so far as the offence punishable under Section 306 etc. IPC i.e. I.CR No. 23/2004 registered

with Naranpura Police Station is concerned, would not come in the way of the petitioners in the present case because both the cases are substantially different and at the time when incident of suicide had occurred, the accused, even as per the case of prosecution, were not in the vicinity of the place where prosecutrix committed suicide. The charge in the Sessions Case for the offence punishable under Sec.306 etc. of IPC is totally different. So, the observations made by the Sessions Court while dealing with discharge application and fact of invitation of charge by not pressing the application moved under sec.227 of CrPC by the petitioners, would not become an embargo against the present petitioners so far as the present case is concerned. On the other hand, word "alibi" a Latin word, indicates "elsewhere" and the say of the petitioners before the Court is that they were present elsewhere than the place of incident/ rape committed on prosecutrix Bijal. For the sake of arguments even if the Court accepts that as such there is no element of unfairness nor there is an element of partiality, then also in a given circumstances and set of facts, appropriate orders to enter into further investigation can be passed and shall have to be passed, otherwise it is likely to cause serious prejudice to the petitioners or to any one of them.

20. In the case of Gudalure M.J. Cherian & Others v/s Union of India & Others, (1992) 1 SCC 397, the Apex Court, without going into the various facts and circumstances mentioned by the petitioners in the writ petition in support of their apprehension that the investigation in the case by the police was not fair and victims are not likely to get justice from the authorities in the State of U.P., has accepted that the investigation may be taken up by CBI of the case immediately and CBI was further directed to complete the investigation within three months from the date of order. The Apex Court felt that " nevertheless, in a given situation, to do justice between the parties and to instil confidence in public mind, it may become necessary to ask CBI to investigate a crime. It only shows the efficiency and independence of the agency." However, the facts before this Court are not that grave and substantial part of investigation has been carried out and it is found mainly on the track. The allegation mainly in the present case is not of either lethargy or clear favouritism, but some over-enthusiasm and/or some negligence is pleaded, if facts placed by the petitioners are appreciated in a true and correct perspective.

21(i) Decision in the case of State of Maharashtra &

Others v/s Sheela R.Kini & Others, (1998)9 SCC 346 cited by ld. Counsel Mr. Shah is found relevant and ratio of the cited decision is helpful to the present petitioners. In the cited decision, the High Court has observed that "having watched progress of the investigation, we have no reason to doubt either the honesty or the integrity of the officers engaged in the investigation. We, however, find that the investigation has now reached a deadlock. We further find that certain vital facts which emerge in the investigation have still remained unanswered. They ....."

(ii) In the present case also, some important infirmity or lacuna have been pointed out by the petitioners and it is specifically alleged that this has happened because of want of fairness on the part of investigating agency. The lacuna infirmity pointed out by the petitioners stating facts in details, if permitted to continue, then, it may fall short to fairness against the required need or standards. Facts are also serious in nature in the present case. The Apex Court in the above case found that investigating agency proceeded on hypothesis namely suicidal death and no steps were taken to find out whether it is a case of murder. The Apex Court observed that " merely because the crime has generated immense amount of public interest or public outcry, not a good ground for transfer of a case from CID to CBI." However, on merits, the Apex Court held that the impression gathered by the High Court on the basis of the report was perfectly within the domine and that being so, no interference under Article 136 of Constitution of India is required and the Apex Court confirmed the High Court's direction to transfer investigation from CID to CBI.

(iii) In the present case, picture is bit different. The say of the petitioners is that the investigation is carried out considering the public-cry and had become pro-prosecution and/or say pro-prosecutrix and, therefore, the contentions of the petitioners was not given any serious consideration qua their plea of alibi. When it is is able to take care of this contingency ordering further investigation by issuing appropriate directions, no fresh or denovo investigation is required to be ordered or service of other agencies like CBI are not required to be requisitioned.

22(i) In the case of Kashmeri Devi v/s Delhi Administration & Another, 1988 (Supp) SCC 482, CBI was directed to make proper and thorough investigation in an independent and objective manner and to submit

"additional chargesheet", if any, in accordance with law. However, the facts are materially different. The Apex Court has also observed that the High Court while dealing with the petition under Article 226 of the Constitution of India, had not cared about certain important aspects and dismissed the petition of Kashmeri Devi. Many relevant aspects were not investigated by the agency and the reply affidavit filed in the writ petition was found completely silent about the allegation made by Kashmeri Devi. As per the allegation, one Gopiram and Sudeshkumar were arrested, taken to police station and Gopiram was beaten to death and the Apex Court found that "prima facie, the police has acted in partisan manner to shield the real culprits and the investigation of the case has not been done in a proper and objective manner. " In the present case, the allegation is of unfair investigation or lack of total objectivity in investigating the plea of alibi, and this has put the petitioners behind the bars and now they are being asked to face the serious charge of gang rape along with other accused persons. The Apex Court, in the above-cited decision of Kashmeri Devi (supra), ordered further investigation under section 173(8) of CrPC through CBI for proper and thorough investigation.

(ii) This Court, in the same way, in view of vital lacunas, can order the police agency to investigate the plea of alibi and other relevant aspects; some are still there; that agency may find relevant, in light of the discussion made in foregoing paras and submit its report to the Court of Sessions where the trial is pending. It will not be necessary to submit the report to the Matropolitan Magistrate Court to avoid protraction of trial unless some new person is need to be chargesheeted. It goes without saying that the report may be in favour of the accused or it may go against them. Ultimately, what shall be the report or the outcome is a matter within the domine of investigating officer entrusted with further investigation.

(iii) Ahmedabad Police in general and Shahibagh Police in particular is not likely to do justice by carrying out the objective and further investigation, if ordered, is also one of the submissions of ld. Sr.Counsel Mr. Shah, but the same is not found acceptable. Now, I am told that respondent No.2 Mr. Oza, ACP, has left the police force on attaining age of superannuation. So, the officer of a rank higher than the rank of respondent No.2 Mr. Oza, ACP, can be asked to undertake this exercise and complete the investigation concentrating as to the plea of " alibi" placed by the accused persons.

(v) The Court has also considered one aspect that the present petition was moved much prior to the conclusion of investigation and filing of formal chargesheet even in connection with any of the aforesaid two main offences referred to in para-8 of the petition. The day on which the petition was filed, it was a tongue stretching between the two i.e investigating agency and the petitioners and no formal cognizance was taken for want of chargesheet and the criminal Court was not in picture legally otherwise the petitioners could have also approached the Court. So, non-exercise of privilege by the police and absence of total fairness by investigating agency has led the petitioners to approach this Court with the petition like the present one.

(vi) A representation drafted by a lawyer made in the present case, should not be viewed with stretched eye-lashes because the profession " Advocate" is an Institution that helps the cause of justice generally. It is true that the FIR filed under the guidance of a lawyer has been viewed differently in "n-number" of cases when such FIRs are taken to the touchstone of appreciation as a piece of evidence. However, it would be wrong to say or presume that such FIR or representation always give exaggerated version or it gives a shape which can not be said to be ethical or legal. In my opinion, in the background of the discussion made herein above, the challan filed by the Investigating Agency was incomplete challan/ report under section 173(2) of CrPC so far as the present petitioners only are concerned.

(vii) The Court is also not in agreement with the submissions of ld. PP Mr. Oza that the present petition is filed only to protract the trial and is delaying tactics. and so though the petition is filed in the year 2004, it is now pressed heavily because the trial court has taken up the case for framing of the charge. However, in view of the nature of orders passed by this Court from the day one and the fact that the petitioners are under-trial and are languishing in judicial custody since long, they normally would not make an attempt to protract the trial. On the contrary, it may be noted that this litigation might not have seen the light of this Court room if Investigating Officer Mr. Oza would have taken care of plea of "alibi" in an appropriate manner and attempted to find out atleast falsify in the plea by recording the statements of all concerned and relevant witnesses irrespective of the fact whether named or not and recording further statements of some persons

(prosecution witnesses) who are named as witnesses in the chargesheet.

23(i) For the reasons aforesaid, the petition is allowed. Commissioner of Police, Ahmedabad City, is hereby ordered and directed to arrange for further investigation in the background of the averments made in the present petition, observations made in this order as well as in the background of the plea of alibi pressed into service by the present petitioners and the details that are made available in the form of documents like printouts of use of telephone/mobile phones etc. of the petitioners, co-accused persons and important prosecution witnesses including prosecutrix Bijal and PW Vaishali etc., through a Police Officer who is enjoying a position of a rank higher than the rank of respondent No.2 Mr. Oza, ACP of City of Ahmedabad i.e. not below the rank of Deputy Commissioner of Police, Ahmedabad City.

(ii) It will be open for such officer who has been entrusted further investigation as aforesaid, to requisite the services of the police officers not below the rank of Deputy Supdt.of Police to complete further investigation in time.

(iii) Investigating Officer who is entrusted such work by the Police Commissioner, is directed to see that further investigation on the above subject is completed and necessary report, if any, is submitted directly to the concerned Court where the trial is pending, within 30 (thirty) days from the date of receipt of this order.
(iv) Till such exercise is undertaken, the ld. Sessions Judge concerned, shall not frame the formal charge against the present petitioners accused. It is further clarified that this would be the "further investigation" and not "fresh" or "denovo" investigation and it should not be construed in any manner a "fresh" or "re-investigation" or "denovo" investigation and report submitted shall be a supplementary report.
Order & directions accordingly.

[C.K. BUCH, J]

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**continued.....

FURTHER ORDER

After pronouncement of the judgment, Mr.A.J. Desai, ld.APP, appearing on behalf of Mr.A.D. Oza, ld.Public Prosecutor, states that the operation and implementation of this judgment may be stayed so that the respondent-State can take appropriate decision to approach the Apex Court.

In view of the above judgment and the contents thereof, the request extended by ld. APP Mr.Desai is not found acceptable and hence, the same is hereby rejected. Even for the sake of argument, if the request is accepted, in that eventuallity the petitioners-accused will be compelled to face the charge during this period of thirty days and, therefore, the request is turned down.

D.S. Permitted.

15.04.2005 [C.K. BUCH, J]

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